Nos. 21,329 and 21,329-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVELYN R. MARKS,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 81-84) are not officially reported.

JURISDICTION

The petition for review (I-R. 99-100) involves federal income taxes for the taxable years 1961, 1962, and 1963 in the respective amounts of $410.15, $390.06, and $269.00. The taxpayer's income tax returns were timely filed and the notices of deficiency covering these taxes were mailed to the taxpayer by the Commissioner on April 29, 1964 (I-R. 8-12), and on December 2, 1964 (I-R. 19-21). Within ninety days after these dates, or on July 22, 1964 (I-R. 1-6),

and March 1, 1965 (I-R. 16-18), respectively, petitions by the taxpayer for a redetermination of the asserted deficiencies were filed in the Tax Court under the provisions of Section 6213 of the Intern Revenue Code of 1954. The decisions of the Tax Court were entered June 2, 1966. (I-R. 97-98.) These cases are brought to this Court by a petition for review filed on August 5, 1966 (I-R. 99-100), wit the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of the Code.

QUESTIONS PRESENTED

1. Whether taxpayer is entitled to any deduction from her gross income from other sources for the amounts she allegedly failed to earn, i.e., the amounts of anticipated earnings, because she was prevented from engaging in her former profession of teaching.

2. Whether taxpayer is immune from the obligation of paying federal income taxes because she allegedly has been arbitrarily deprived of certain rights and benefits which are supported by tax revenues.

3. Whether taxpayer is entitled to a deduction for education expenses allegedly incurred by her to obtain her teacher's license.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 1. TAX IMPOSED.

(a) Rates of Tax on Individuals.--A tax is hereby imposed for each taxable year on the taxable income of every individual other than a head of a household to whom subsection (b) applies

The amount of the tax shall be determined in accordance with the following table:

* * * * *

(26 U.S.C. 1958 ed., Sec. 1.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.162-5 Expenses for education.

* * * * *

(b) Nondeductible educational expenditures--(1) In general. Educational expenditures described in subparagraphs (2) and (3) of this paragraph are personal expenditures or constitute an inseparable aggregate of personal and capital expenditures and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.

(2) Minimum educational requirements. (i) The first category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is required of him in order to meet the minimum educational requirements for qualification in his employment or other trade or business. The minimum education necessary to qualify for a position or other trade or business must be determined from a consideration of such factors as the requirements of the employer, the applicable law and regulations, and the standards of the profession, trade, or business involved. The fact that an individual is already performing service in an employment status does not establish that he has met the minimum educational requirements for qualification in that employment. Once an individual has met the minimum educational requirements for qualification in his employment or other trade or business (as in effect when he enters the employment or trade or business), he shall be treated as continuing to meet those requirements even though they are changed.

* * * * *

(26 C.F.R., Sec. 1.162-5(b).)

STATEMENT

The Tax Court found the facts to be substantially as follows (I-R. 81-82):

The taxpayer filed her federal income tax returns for the taxable years 1961, 1962, and 1963 with the District Director of Internal Revenue at Los Angeles, California. In these returns, the first two of which were later amended, the taxpayer reported that sh had total income of $3,197.94 (I-R. 37), $3,004.88 (I-R. 46), and $2,150.61 (I-R. 49), respectively. The taxpayer then deducted the sum of $3,498.06 in her 1961 amended income tax return (I-R. 38-39), $3,667.12 in her 1962 amended income tax return (I-R. 47-48), and $4,902.00 in her 1963 income tax return (I-R. 50-51), as allegedly representing the difference between her anticipated earnings from th use of teaching credentials had she been allowed to engage in her former profession of teaching and her actual earnings in those years (I-R. 82). These deductions eliminated altogether taxpayer's tax liability for the years in question. However, the Commissioner of Internal Revenue disallowed the same and issued notices of deficienc

Upon the receipt of the notices of deficiency the taxpayer instituted proceedings in the Tax Court for a redetermination of the asserted deficiencies. (I-R. 1-6, 16-18.) After a trial on Decembe 1965, the Tax Court on March 24, 1966, found in favor of the Commissi on the grounds that there is no provision in the Internal Revenue Cod that allows a taxpayer a deduction for loss of anticipated earnings, that one cannot avoid federal taxation as a form of self-regulated

redress, and that a constitutional question was not properly raised. (I-R. 81-84.) The taxpayer's request for a rehearing was denied by the Tax Court on March 31, 1966 (I-R. 86-88), and the Tax Court entered its formal decisions on June 2, 1966 (I-R. 97-98). On August 5, 1966, the taxpayer filed a petition for review by this Court. (I-R. 99-100.)

SUMMARY OF ARGUMENT

1. The first issue in this case involving the deductibility from gross income from other sources of alleged anticipated earnings which were not earned because of the happening of a certain event was before the Supreme Court in Hort v. Commissioner, 313 U.S. 28 (1941), where it was answered adversely to the taxpayer therein. That decision is controlling here.

2. With regard to the second issue, Section 1 of the Internal Revenue Code of 1954 imposes a tax "on the taxable income of every individual." The taxpayer has failed to meet the burden placed upon her to show that her income was exempt from taxation either under a provision of the Code or because the Code contravened a provision of the Federal Constitution.

3. The third issue was not raised below. Therefore, it is not properly before this Court. Even if the Court were to consider it, it is hornbook knowledge that a person may not deduct educational expenses incurred to acquire professional standing because these expenses are in the nature of personal expenses which are proscribed by Section 262 of the 1954 Code. Moreover, there is no evidence of

record here that such expenses were incurred or were incurred in th taxable years in question. The taxpayer has failed to meet the burden placed upon her to show that the Internal Revenue Code permi a deduction for educational expenses incurred to acquire profession standing.

ARGUMENT

I

THE TAX COURT CORRECTLY DETERMINED THAT THE TAXPAYER MAY NOT DEDUCT FROM HER GROSS INCOME FROM OTHER SOURCES ANTICIPATED INCOME SHE FAILED TO EARN AFTER ALLEGEDLY BEING DENIED THE RIGHT TO TEACH IN PUBLIC SCHOOLS IN CALIFORNIA

Here the taxpayer is seeking to deduct from her gross income f other sources amounts she allegedly failed to earn, i.e., amounts of anticipated earnings, because she was reputedly prevented from engaging in her former profession by reason of the cancellation of her license to teach. The issue thus raised is clearly controll by the Supreme Court's decision in Hort v. Commissioner, 313 U.S. 2 (1941). The taxpayer in Hort wanted to deduct the difference betwe the amount that he could have earned from a lease had it not been cancelled and the amount that he received as consideration for its cancellation. The Court held that this was not permissible and sai (pp. 32-33):

> Undoubtedly * * * [the cancellation of the lease] diminished the amount of gross income petitioner expected to realize, but to that extent he was relieved of the duty to pay income tax. Nothing in § 23(e) [of the Revenue Act of 1932, now Section 165(c) of the Internal Revenue Code of

> 1954] indicates that Congress intended to allow petitioner to reduce ordinary income actually received and reported by the amount of income he failed to realize.

The taxpayer in this case is in the same position as was the lessor in Hort. In Hort, that taxpayer claimed to have suffered a property loss which resulted in a reduced income. However, this type of loss, as the Supreme Court pointed out, relieves the taxpayer from paying taxes on the amounts not earned, but does not give the taxpayer a deduction from earned income for the amounts not earned. The law with regard to such an attempted deduction has not been changed.

Thus, here the taxpayer was relieved of the duty of paying taxes to the extent that her anticipated gross income was diminished by her inability to engage in the teaching profession. But as the Tax Court correctly said below, "it is well settled that a taxpayer is not allowed to reduce ordinary income actually received by the amount of income he failed to realize." (I-R. 82.) See also Hutcheson v. Commissioner, 17 T.C. 14 (1951), and, Jones v. Commissioner, decided June 4, 1942 (P-H Memo B.T.A., par. 42,324).

II

THE TAXPAYER HAS FAILED TO SUSTAIN THE BURDEN THAT RESTS UPON HER TO SHOW THAT HER INCOME IS IMMUNE OR EXEMPT FROM TAXATION

Section 1 of the Internal Revenue Code of 1954, supra, imposes a tax "on the taxable income of every individual." It is a well-established principle of federal tax law that a deduction from gross income is a matter of legislative grace and that one who claims an exemption or a deduction under the Code "must be able to point to an

applicable statute and show that he comes within its terms." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Helvering v. Northwest Steel Mills, 311 U.S. 46, 49 (1942); and Weible v. United States, 244 F. 2d 158, 162 (C.A. 9th, 1957). The taxpayer h failed to point to any specific statute that would exempt her incom from taxation and, indeed, we respectfully submit, none exists.

Rather, the taxpayer claims that the Internal Revenue Code of 1954 is unconstitutional as applied to her. She claims that the Code violates the Fourteenth Amendment. As pointed out by the Tax Court below, the Fourteenth Amendment is not applicable to the Federal Government but to the several states. (I-R. 83.) See also, Wight v. Davidson, 181 U.S. 371, 384 (1901); Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937); and Hess v. Mullaney, 213 F. 2d 635 644 (C.A. 9th, 1954), certiorari denied sub nom. Hess v. Dewey, 348 U.S. 836. Further, it is an axiom that to challenge the constitutionality of a particular section of any one of the revenue acts, on must set forth the specific constitutional provision alleged to be violated. See, Prather v. Commissioner, 322 F. 2d 931, 934 (C.A. 9t 1963); United States v. Hayman, 342 U.S. 205, 223 (1952); United Pub Workers v. Mitchell, 330 U.S. 75, 89-91 (1947); Federation of Labor v. McAdory, 325 U.S. 450, 461-462 (1945); Kitagaw v. Shipman, 54 F. 2d 313, 315 (C.A. 9th, 1931), certiorari denied, 286 U.S. 543 (1932) Dillon v. Commissioner, 20 B.T.A. 690 (1930); and 1 Mertens, Law of Federal Income Taxation (Rev.), Sec. 4.06. The taxpayer has failed to point out other than the inapplicable Fourteenth Amendment

the particular provision of the Constitution that the Internal Revenue Code allegedly violates.

Finally, the party attacking an Act of Congress has the burden of overcoming the presumption that the statute is constitutional and of clearly proving that the act is unconstitutional. See Madden v. Kentucky, 309 U.S. 83, 88 (1940); Borden's Co. v. Baldwin, 293 U.S. 194, 209 (1934); and Gorin v. United States, 111 F. 2d 712, 720-721 (C.A. 9th, 1940), affirmed, 312 U.S. 19 (1941), rehearing denied, 312 U.S. 713. Taxpayer has not presented one scintilla of evidence or logical reasoning to show that the Internal Revenue Code is unconstitutional. Clearly she has not sustained the heavy burden placed upon one who attacks the constitutionality of an Act of Congress.

Inasmuch as the taxpayer has failed to show in any wise that her income is exempt or immune from taxation, the Tax Court's decision should, we respectfully submit, be affirmed.

III

THE TAXPAYER FAILED TO RAISE THE ISSUE AS TO WHETHER A PERSON IS ENTITLED TO DEDUCT THE EXPENSES INCURRED TO ENTER A PROFESSION BEFORE THE TAX COURT NOR DID SHE INTRODUCE ANY EVIDENCE BEARING ON THE PROBLEM, AND, THEREFORE, SUCH ISSUE IS NOT PROPERLY BEFORE THIS COURT AT THIS TIME, BUT IF IT WERE, THE LAW IS CLEAR THAT SUCH EXPENSES ARE NOT DEDUCTIBLE

The taxpayer raises here for the first time the question of whether she should be allowed a deduction for purported expenses incurred to obtain her alleged teacher's license. Unless a party property raises

an issue before the Tax Court, the appellate court will not ordinari consider the issue on appeal. See Hormel v. Helvering, 312 U.S. 552 (1941); Helvering v. Tex-Penn Co., 300 U.S. 481, 498 (1937); Doric C v. Commissioner, 341 F. 2d 967, 972 (C.A. 9th, 1965); Vogel's Estate v. Commissioner, 278 F. 2d 548, 550 (C.A. 9th, 1960); and Commissione v. Belridge Oil Co., 267 F. 2d 291 (C.A. 9th, 1959). Where no new findings of fact were necessary, this Court in MacRae v. Commissioner 294 F. 2d 56 (1961), permitted the taxpayer to raise an alternative ground to support his claim. However, it is the Commissioner's contention that the ground attempted to be raised by the taxpayer here to support her deduction has no factual foundation of record in this case; and, even with a factual foundation, such ground is clearly without merit. Inasmuch as the record is devoid of any proof that the taxpayer incurred such expenses or that they were incurred in the taxable years in question and inasmuch as such facts would have to be present to even begin to support the taxpayer's claim, the case of MacRae, supra, is not applicable. Therefore, since this contention of taxpayer was not raised below, we respectfully submit that it should not be considered here at this time.

However, if the Court should feel that this contention should be considered, it is the Commissioner's position that it is entirely with out merit. The cost of entering a profession is a personal expense the deduction of which is not allowable under the direct proscription of Section 262 of the Internal Revenue Code of 1954, supra. See also Treasury Regulations on Income Tax (1954 Code), Sec. 1.162-5(b), supra; Greenberg v. Commissioner, 367 F. 2d 663 (C.A. 1st, 1966); and

4A Mertens, Law of Federal Income Taxation (Rev.), Sec. 25.122. Further, as is pointed out above, the burden is upon the taxpayer to show that the deduction of her purported expenses is allowable. Again, she has failed to sustain this burden.

CONCLUSION

For the reasons given above, the Tax Court's decision should be affirmed.

Respectfully submitted,

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DECEMBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of December, 1967.

_____
David English Carmack, Attorney